No. 12,356

IN THE

United States Court of Appeals

For the Ninth Circuit

A. E. WAXBERG and WM. A. BIRKLID,
Appellants,

vs.

ALPHELD HJALMAR NORDALE and ARNOLD MAURITZ NORDALE, co-trustees of the Nordale Estate Trust,
Appellee.

BRIEF FOR APPELLANTS.

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FILED
JAN 18 1950
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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTION OF DISTRICT AND APPELLATE COURTS.

This action was commenced by Appellee in the District Court for the Territory of Alaska, Fourth Judicial Division. On the 22nd day of September, 1948, an amended Complaint (T. R. pp. 2 to 6) was filed in said cause whereby Appellee sought to recover possession from the Appellants of certain real property located within the said Fourth Judicial Division and damages for the detention of same. Issues were joined on said amended Complaint by Appellant's answer. (T. R. pp. 18 and 19.)

Judgment was entered for Appellee on the 25th day of June, 1949. (T. R. pp. 36-39.) Notice of Appeal was served and filed on the 29th day of June, 1949. (T. R. p. 39.) After motion by Appellants to extend time to file, record and docket cause was granted by the said District Court (T. R. pp. 40-41), the appeal was duly perfected and lodged in this Court within the time allowed by law and by the extension granted by the said District Court.

The right of appeal from the said District Court to this Court is provided for by 28 U.S.C. sec. 1291.

STATEMENT OF CASE.

In this case, Appellee sought to recover certain land from the Appellants by an action in ejectment. Appellee alleged, and sought to prove, that the land for which recovery was asked was an accretion to Appelle's upland. Appellants sought to show that the land in question was not an accretion but an artificial fill.

Appellants complain that the trial Court failed to consider the import of its evidence that the land in controversy was an artificial fill and erroneously found that the Appellee had sustained its burden of proof that the said land was formed by accretion to the upland. The manner in which these questions are saved is set out in the "Statement of Points Relied Upon for Reversal", infra.

"STATEMENT OF POINTS RELIED UPON FOR REVERSAL."

FIRST POINT RELIED UPON FOR REVERSAL.

The first point Appellants rely on for reversal is the District Court's overruling Appellants' Motion for a New Trial (T. R. pp. 27 and 28) and the said Court's finding (paragraph IV, T. R. p. 31 of the Findings of Fact and Conclusions of Law) that the amount of debris deposited by third persons "was an infinitesimal per cent of the amount of accretion and there was nothing in it to show that it had had an effect upon the forming of the accretion." Appellants, by the second paragraph of their Motion for New Trial (T. R. p. 28) called the Court's attention to its failure to take into consideration Appellants' evidence that the land in question "was not an accretion but was formed by the deposit of waste and debris on the shore." These matters were assigned as errors in this Court. (T. R. pp. 302-303.) The District Court was apparently of the opinion that had Appellants shown such deposits the Appellee would still have been entitled to recover possession of the disputed premises. (T. R. p. 23 of District Court's Opinion, T. R. pp. 21 to 27.) It is Appellants' contention that their evidence at the trial of cause showed most of the alleged "alluvium" to which Appellee lays claim to consist of artificial fill and not to constitute accretion as defined by law; and that the title to artificial fill caused by the deposits of debris even without the consent or knowledge of the littoral owner and even though some evidence of alluvial deposits is present, does not vest in the littoral owner.

Testimony of Appellants' witnesses established that the land occupied by Appellants for which Appellee seeks recovery was artificial fill—debris of all sorts mixed together with soil and presenting no orientated strata which would be present if the deposits were alluvium resulting from the process of accretion.

Concededly, the action of the Chena River deposited some silt on and along the shores lying in front of the Appellee's land. The amount of this natural deposit, however, was very small, considerably less than the artificial fill and what alluvium was present must, in the nature of things, have been considerably accelerated by the use of the shores as a dump yard.

A. E. Waxberg (T. R. pp. 217-231 and pp. 254-265), one of the Appellants, after having testified to his occupation of the land in question by moving a structure thereon (T. R. p. 220), related that he dug a hole in front of the structure approximately four and one-half (4½) feet wide and seven (7) feet deep in order to install an oil tank. (T. R. pp. 224 and 225.) Mr. Waxberg testified that several photographs were taken of the hole and the filling removed therefrom at various stages in the process of excavation. The photographs were introduced as Appellants' (then defendants') Exhibits "A", "B" and "C". An examination of these Exhibits, coupled with Waxberg's identifying testimony, show that the composite structure of the fill removed in the excavation of the hole consisted of logs, tin cans, old pieces of board and boxes, drum hoops, barrel staves, a clincher tire

rim, a dark area of filled soil and some sedimentary deposit. (T. R. pp. 225 to 231.) The hole from which this fill was removed was approximately thirty (30) feet, according to Mr. Waxberg's testimony, from the rear of the north end of Appellee's building (T. R. p. 225), which according to Appellee's testimony (T. R. pp. 92 and 93) had been built at the water's edge in 1906 with a foundation of piling on the north end. It is to be noted that Waxberg testified that the pilings in the middle, the north end of that building, were six (6) to seven (7) feet long. (T. R. 221.) Thus, the seven foot hole dug by Appellants was well below the original water level of the Chena River. Waxberg, after being excused while Richard Ragle testified, also testified that he had seen Mr. Wehner, a previously identified city employee (T. R. p. 170), dumping dirt behind Appellants' structure at the end of Lacey Street. (T. R. p. 258.)

Richard Ragle was the next witness called by the Appellants. (T. R. pp. 231 to 253.) He qualified as an expert witness, being a professor of Geology at the University of Alaska. Having stated that he had examined two test pits on the land in question which showed the material removed therefrom to consist of sundry debris mixed together without orientation with dirt, unstratified soil, he testified (T. R. p. 236) that the material found "had not been transported to its present site by any natural agency. It had not suffered any differential flotation due to transportation by running water, and there was not stratification; fragments of wood that were present below the sur-

face indicated that water was not present at the time this material was deposited.

Having examined Appellants' (then defendants') Exhibits "A" and "B" and testifiying that they revealed similar conditions to the pits he examined, he gave his expert opinion as to the nature of the ground in dispute. (T. R. p. 242.)

"I would state, in my opinion, that there is an artificial bearing in thickness from two to eight feet, resting between the river bank and the back of the buildings that front on First Avenue. That the materials present in their present arrangements could not have been deposited by a natural agency."

Upon examination by the Court (T. R. p. 243), he stated that his judgment was also based on "erosion cuts".

The testimony of Appellants' remaining witnesses, Richard Rothenburg (T. R. pp. 266-275), Albert Norlin (T. R. pp. 275 to 282), Davis Stanford (T. R. pp. 283-290) and Charlie Main (T. R. pp. 291-295), showed that this land had been used as a dump yard by a "scavenger" outfit and the public in general, thus explaining how the artificial fill testified to occurred.

It is, perhaps, interesting to note that this latter testimony was corroborated to a certain extent by Appellee's own witnesses: Adolph Wehner (T. R. pp. 170, 171 and 174); Leo Preg (T. R. p. 198).

As far as Appellants' theory of the substantive rule of law applicable to this case, it is pertinent to ob-

serve that little or no use was ever made of the portion of land in controversy. Appellant, Waxberg, testified in direct examination that there were no improvements on the land when he occupied the same in 1948 (T. R. p. 217) and this was not controverted by Appellee. The land had been building up, according to Appellee's theory of the case, from 1903 to date. The "accreted" portion at the time of the trial extended approximately two hundred (200) feet from the original north boundary of Lot 6, Block 4, to which Appellee acquired title from the Townsite Trustee in 1922. It is only fair to assume that a usable or occupiable portion of that "accretion" had formed by 1922; yet from 1922 until the Appellants moved on the land in 1948, no constructive use had ever been made of the land. Attention is called to Appellee Alpheld Hjalmar Nordale's testimony (T. R. pp. 97 and 98) where he testifies that, with respect to the north end of the lot (unusual for Appellee must have been referring to the land in controversy) he had "kept it clear and maintained it physically". He remembered one specific instance of so doing "in the fall of 1945" when he had had the brush cleared.

Assuming that Appellants' evidence as set out establishes that most of the land in controversy consists of artificially deposited materials, then the trial Court has taken a mistaken view of the substantive law applicable to such a fact-situation.

The trial Court seeks to hang its opinion on two horns: first, as trier of fact, the District Judge states

(T. R. p. 22): "The amount of such debris was an infinitesimal per cent of the amount of alluvium and there was nothing in it to show that it had any effect upon the forming of the alluvium." Second, as applier of substantive law, the District Judge, then states that a contrary finding of fact wouldn't make any difference anyway, indicating, perhaps, uncertainty in his findings of fact.

"Even if defendants had shown that debris had been deposited artificially in such quantities as to increase the deposit by accretion, it would nevertheless have been immaterial as the riparian owner had no part in making the artificial deposits." (T. R. p. 23.)

Appellants concede that Appellee had no knowledge of the deposits and that the deposits were made entirely by third persons; they do not concede the proposition of law as stated. It is submitted that the District Court has failed to distinguish between fact-situations where structures have been built in the water above or below the littoral owner's shore, thus affecting the flow of current and the resultant deposit of sedimentary materials, and cases where the shore and waters adjoining the upland have been artificially filled. The difference sought to be drawn is one between the water itself acting as the depositing agency though its flow is affected by causative factors artificially constructed and the deposit of materials by some agency other than water.

Cited as authority for the proposition of law laid down by the trial Court, supra, is the case of *St. Clair*

v. Lovington, 23 Wall. 46, 23 L. Ed. 59. We accept the definition of accretion as laid down by the United States Supreme Court in that decision:

> "It is insisted by learned counsel for plaintiff in error that the accretion was caused wholly by *obstructions placed in the river above,* and that hence the rules upon the subject of alluvium do not apply. If the fact be so, the consequence does not follow. There is no warrant for the proposition. The *proximate* cause was the deposits made by the water. The law looks no further. Whether the *flow of the water was natural or affected* by *artificial means* is immaterial. In the light of the authorities, 'alluvium' may be defined as an addition to riparian land, gradually and imperceptibly made by water to which the land is contiguous. Whether it is the effect of natural or artificial causes makes no difference." (Italics supplied by the Appellants.)

The above language, we submit, points out clearly the failure of the District Court to distinguish clearly between artificial causation and artificial fill.

As is apparent from an examination of the above definition, a deposit of material by the action of water is an essential part of the definition of accretion and, by definition, the doctrine of accretion can have no applicability to the deposit of materials by human agency. In the instant case, the Appellee cannot predicate any right to recover the land in controversy upon the doctrine of accretion.

That the doctrine of accretion is not applicable where the artificial fill is made by the littoral or upland owner is clear.

Lorino v. Crawford Packing Co., 142 Tex. 57, 175 S.W. (2d) 410;

People ex rel. Blakeslee v. The Commissioners of the Land Office, 135 N.Y. 447, 32 N.E. 139;

Saunders v. New York Cent. & H. R. Co., 144 N.Y. 75, 38 N.E. 992;

Nevin v. Friedauer, 198 App. Div. 250, 190 N.Y.S. 682.

Nor by definition does it apply to fill by third persons other than the upland owner.

"The doctrine of accretion rests upon an increase by imperceptible degrees through natural causes, such as ordinary action of water. It does not apply to land reclaimed by man through filling in land once under water, and making it dry." *Sage v. Mayor, etc. of City of New York,* 154 N.Y. 61, 47 N.E. 1096, 1103.

"Title by accretion can be acquired only when the accretion is due to a gradual and natural deposit of soil along the border of the upland." *In re Driveway in City of New York,* 46 Misc. Rep. 157, 93 N.Y. S. 1107.

"In order for littoral owner to be entitled to accretions which may form upon the upland, such accretions must have been the result of natural causes and must have been formed gradually and imperceptibly. Accretions which have been added to the upland by artificial means do not inure to the benefit of the littoral owner, but remain in the

state or its successor in interest." *City of Newport Beach v. Fager,* 39 Cal. App. (2d) 438, 442.

"It is equally true that this principle does not apply where land has been made by human agency by depositing material on a river bottom. Such accretions are not 'gradual and imperceptible' and are not 'brought down by rivers,' or other streams." *Black et al. v. American International Corporation* (1919) 264 Pa. 260, 107 A. 737, 738.

Accord: *O'Neil v. Murray,* 120 Misc. Rep. 151, 198 N.Y.S. 705.

It is to be noted that the cases quoted from involve fact-situations where a division of government has been the responsible agency for the artificial fill and it is to be candidly admitted that the case of *Black et al. v. American International Corporation,* supra, places emphasis upon the factor of knowledge and consent of the upland owner, and that the case of *Sage v. Mayor,* supra, indicates that a different result might be reached if the artificial fill had been caused by wrongdoers or trespassers.

Considering the definition of accretion, as laid down by the authorities, it is submitted that the legal status of the filler or the state of mind of the upland owner can have no effect on whether or not there has been, in fact, accretion to the upland.

Sage v. Mayor, supra, insofar as the case would distinguish between deposits by wrongdoers and deposits by third persons is based on the prior New York decision of *Steers v. City of Brooklyn,* 101 N.Y. 51, 4 N.E.

7. In that case the City of Brooklyn had entered on Steer's premises to construct a pier and the pier was affixed to the upland. The Court talked in terms of accretion with respect to the affixation of the pier; however, it is difficult to conceive how the doctrine of accretion could be applicable to such a case and the real basis of the decision would seem to be whether or not a trespasser should be allowed to claim title to a fixture which he had wrongfully attached to another's land. As far as Appellants can ascertain, the holding of the *Steer* case and the dicta of *Sage v. Mayor,* supra, have not been reiterated in New York case law. Of course, the distinction might retain some vitality where the trespasser himself laid claim to artificial fill which is not true in the case being appealed.

Nor, as stated before, does the fact of knowldege of the process of filling seem of any weight in determining where the doctrine of accretion is applicable. The filling would not be an alluvial deposit—that is, would not be the result of the action of the water. True, from knowledge, it might be inferred that the upland owner waived certain littoral rights such as access to the stream, but it is beyond Appellants' discernment to conceive how the upland owner's factual unawareness can convert artificial fill into accretion. Such a doctrine would place a premium on unawareness as well as create a convenient indifference to whether one's shores were to be used as a dump yards or not —a state of mind hardly calculated to encourage civic beautification.

It is to be further noted that Appellee has introduced no evidence to show that its title when acquired from the city extended beyond the north boundary of the Townsite of Fairbanks and they do not claim to own beyond the highwater mark of the Chena River. The north boundary of the Townsite of Fairbanks and the highwater mark of the Chena River are apparently claimed by Appellee to be the same. The title to the Chena River bed to the highwater mark must be assumed to be in the United States Government. Title to river bed filled in and made dry could not have resulted in a change of title from the United States Government to the Appellee. *Black et al. v. American International Corporation,* supra, *City of Los Angeles v. Anderson,* 206 Cal. 662, 275 P. 789, *City of Newport Beach et al. v. Fager et al.,* supra, *Nevin v. Friedauer,* supra.

In the case of *Nevin v. Friedauer,* cited last, a city contractor had dumped dredged fill along the margin of the upland. Title to the bed of the water filled in was found to be in the City of New York. The New York Court held that the upland owner did not take title to the fill. The Government had title to the bed and the fact that it was raised above the surface of the water could not affect that title. (p. 682.) "She (the plaintiff) now seeks to take advantage of the unexplained vagaries of some government contractor who has filled in an additional block of the city's land."

It is submitted that the interest of the United States Government is presented by the record. Al-

though Appellants erroneously failed to save the question of their rightful or lawful entry on the land in dispute by not specifying as error the Court's refusal to permit the introduction of evidence concerning their location of the land as a portion of the public domain (T. R. p. 218); still, the interest of the Government becomes apparent in the light of several questions asked by Appellee's own counsel:

Direct examination of Lee Linck, Appellee's witness:

"Q. And did you indicate on this plat (Plaintiff's Exhibit 3) the portion of the property in question which has been occupied or *located* by Waxberg and Birklid, the defendants, in accordance with their *location notice.*

A. Yes, we have, it is indicated in—by a hatched line on this map.

Q. And that follows around the *metes and bounds description as given in their location notice?*

A. Yes, it does." (T. R. pp. 120 and 121.)

And on p. 127 of the T. R., Appellee's attorney stated in answer to a question propounded by the Court:

"* * * Paragraph III was the description based on the *location notice* of the Defendants."

Thus, the entry of Appellants and location of the land as a portion of the public domain is manifest from the record. This is a material consideration for this Court in view of the fact that no claim has been laid by Appellee to land below the ordinary high water mark.

As indicated earlier in the brief, Appellants also feel that Appellee's failure to make any constructive use of the premises in question is a material factor for the consideration of this Court.

In *Wayne v. Diboff et al.,* 9 Alaska 230, Judge Alexander of the District Court stated, p. 232:

> "The law of accretion in the United States was adopted with the common law of England and has never been changed by the Constitution of the United States or any law passed by Congress; and accretions have always been granted to the adjoining owners on the theory that additions to such land are compensation for the losses sustained by decretion or the wasting away of the uplands, and on the theory that small and insensible portions of land should not be allowed *to be idle* without an owner between the upland and seashore." (Italics supplied by Appellants.)

If the basis of the doctrine of accretion is, in part, one of preventing economic waste, then Appellee surely cannot complain that the witholding of that application in the instant case would controvert that purpose. *A fortiori,* he cannot complain where the facts do not show alluvium but are artificial deposit.

Furthermore, it requires no citation of authority that another of the bases of the doctrine is that a riparian or upland owner should not be deprived of access to the water. Again Appellee cannot complain of a finding that the doctrine is not applicable in the instant case, there being no showing by Appellee that accessibility was necessary and important to him.

CONCLUSION TO FIRST POINT.

In determining the rule of law applicable to the present fact-situation this Court should bear in mind not only the adjudicated cases but also reasons of policy why one principle of law should be applicable rather than another.

Alaska is a relatively new area of settlement and as such its people may profit from the mistakes made in other areas belonging to the United States in the process of settlement. This Court may judicially notice that in recent years matters of stream pollution have occupied the nation's attention and that at the municipal level of government the trend has been towards cleaning up the shores and banks of streams and lakes and to pass more strict laws against the indiscriminate dumping of waste materials and debris. It is submitted that the applicable law should not encourage nor compensate idle inattention by upland owners of what use is made of the adjoining shores and beaches.

SECOND POINT RELIED UPON FOR REVERSAL.

The second point Appellants rely on for reversal is the District Court's denial of Appellants' Motion to Dismiss (T. R. p. 216) and the Court's denial of Appellants' Motion for New Trial (T. R. p. 27) with respect to paragraph I thereof; and that the said District Court erroneously found that the land in dispute was formed by the process of accretion. (T. R. par. III of District Court's Finding of Facts.) The

matters were designated as error in this Court. (T. R. pp. 302 and 303, Statement of Points Nos. 2, 3 and 4.) The question sought to be raised is whether or not Appellee sustained its burden of proof that the disputed land was formed by accretion as defined by law. Appellee sought to prove that the land in dispute was alluvium deposited imperceptibly by the action of the Chena River along the upland.

In *Wilson v. Watson,* 144 Ky. 352, 138 S.W. 283, the Court of Appeals of Kentucky defined "alluvium" and "accretion" as follows, p. 284:

> " 'Alluvium' is a deposit, usually of mingled sand and mud, resulting from the action of fluviatile currents, and is applied by geologists to the most recent sedimentary deposits, especially such as occur in the valley of large rivers.
>
> " 'Accretion' is the increase or growth of property by external accessions, as by alluvium naturally added to land situated on the bank of a river, or on the sea shore."

Accretion has been defined by this Court as the slow, imperceptible and natural addition to original lands, by water receding therefrom and filling in by deposits of sand, mud or vegetation raising the surface of the land above water level. *Western Pacific Railway Co. v. Southern Pacific Railway Co.,* 151 Fed. 376.

The burden of proof to show that the formation in question was accretion as defined above was, of course, imposed on Appellee. *Simpson v. Martin,* 174 Ark. 956, 298 S.W. 861.

An examination of Appellee's evidence, giving it its full weight, reveals that it fell short of sustaining that burden.

Appellee's first witness, A. H. Nordale, testified that the upland was flooded once or twice a year leaving some alluvial deposit and that over a period of years the disputed premises were building up. How much alluvial deposit was left after each flood does not appear nor is the period of years to which Nordale referred to apparent from the record. (T. R. pp. 94 to 96.)

Appellee's witness, Fred Parker, Sr., stated that between the years 1903 and 1906 a mill pond along the upland kept filling in with silt. (T. R. p. 151.) He testified also with respect to appellee's Identification 2 that a beach appearing thereon was the result of the deposit of silt "constantly coming down the river and building it up." (T. R. p. 155.) Identification 2 was a photograph of the premises taken in 1915. The witness Parker stated that he had not observed the action of the river "much" between the year 1906 and the year 1921 (T. R. p. 153), so that anything he stated about the deposit of silt along the upland must be considered largely a conclusion. Giving the greatest weight possible to Parker's testimony, it can only be taken as establishing that between the years 1903 and 1906 there was an undefined quantity of silt deposited in a mill pond in front of the upland.

Perhaps Appellee's best testimony was elicited from Adolph Wehner. (T. R. pp. 164-178.) He testified that the shore had been gradually building up through the years by the action of the river. However, on both direct and cross-examination he admitted that he, himself, along with other people had done a considerable amount of dumping on the disputed premises.

Appellee's next witness, Oscar Engstrom (T. R. 178-185), did not testify that there was any accretion to the premises in question. In fact, he testified that during his period of working at the sawmill in 1904 that the mill pond did not appear to be filling up with silt. (T. R. p. 181.)

Leo Preg (T. R. pp. 185 to 201) testified that the disputed premises had built up through the years by the deposit of silt. He did not testify to any examination of the nature of the deposit. A clue perhaps to the value of any testimony as to the nature of the accession is given by the witness' response to a question on direct examination (T. R. p. 190):

"Q. Has that been due to the action of the river?
A. Why sure. Nothing else."

It shows, perhaps, that in the absence of an analysis of the composite structure of the premises, that any witness' testimony that the premises were built up by the deposit of silt is largely a conclusion, he knowing of no other factors.

The testimony of Appellee's witness, Reuel Griffin (T. R. pp. 201 to 209), was an attempt by Appellee to show, by photograph, the amount of alluvial deposit

that remained after a particular flood. Nothing was established by this testimony as, on cross-examination, the condition of the premises prior to the occurrence of the particular flood was not shown, so that the photograph taken of the "alluvial deposit" might have been a combination of alluvial deposits from several floods.

Perhaps, in the absence of any evidence showing that the deposit consisted of something other than alluvium, the testimony of Appellee's witnesses would be sufficient to make out a prima facie case of "accretion". Giving Appellee's evidence the most weight possible, it has established that the land in question has built up slowly over a period of years and that it is the conclusion of Appellee's witnesses that the deposit of silt by the Chena River was the responsible factor for such building up. It is submitted, however, that more should be required in the way of proof than testimony by several witnesses that the land was being "built up" by the deposit of silt borne by the waters where evidence has been introduced that the nature of the formation was examined and found not to be alluvium but artificial fill. (See discussion of Appellant's evidence under First Point Relied Upon for Reversal, supra.) There is no testimony by any of Appellee's witnesses that they examined the premises. An essential element of the doctrine of accretion being imperceptibility in the formation of alluvium, testimony that the premises in question were being built up by the alluvial deposit of silt must necessarily be

speculative without a confirming analysis of the deposit.

Dated, Fairbanks, Alaska,
January 9, 1950.

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